WILLKIE FARR & GALLAGHER LLP **MEMORANDUM**

TO: Files

CC: San Diego Audit Committee

FROM: Willkie Farr & Gallagher LLP

RE: Interview of Tom Zeleny on April 26, 2006

DATED: July 6, 2006

On April 26, 2006, Michael Schachter and Michael Shapiro, in Willkie Farr & Gallagher LLP's capacity as counsel to the Audit Committee, interviewed Tom Zeleny at the City Administration Building, 202 C Street, in San Diego, in a conference room on the third floor. Johnny Giang and Ross Reid from KPMG also attended the interview. Mr. Zeleny was not represented by counsel.

The following memorandum reflects my thoughts, impressions, and opinions regarding our meeting with Tom Zeleny, and constitutes protected attorney work product. It is not, nor is it intended to be, a substantially verbatim record of the interview.

Warnings

Mr. Schachter informed Mr. Zeleny that we are counsel to the Audit Committee and do not represent him or any employee. He advised Mr. Zeleny that the interview may be considered attorney work product and confidential, but the decision of whether to keep it confidential will be made by the Audit Committee in the best interests of the City, not by Mr. Zeleny personally. He said that it is important for Mr. Zeleny to keep the contents of the interview confidential to maintain the integrity of the process. Mr. Schachter said we will create a report which may contain statements of interviewees, and this report will likely be provided to KPMG and ultimately made public. He said government agencies may view the report and be provided with additional information so it is important to be truthful and accurate.

Background

Mr. Schachter asked Mr. Zeleny to describe his professional background. Mr. Zeleny stated that he received a degree in mechanical engineering from the University of California-Berkeley and then worked in Ohio and Japan designing cars for Honda. He then attended law school and became an intern in the Office of the City Attorney in 1992. He has worked in the City Attorney's Office on a full-time basis since 1995, and has worked on metro wastewater issues since 1997. He currently deals with construction and contracts regarding wastewater, on the advisory side. As of a few weeks ago, he became Chief of the Public Works Unit after Kelly Salt (Chief Deputy City Attorney of the Public Works Section) left the City's employ for private practice. In this position, he deals with increases in sewer rates and prepares resolutions regarding sewer rates for the Metropolitan Wastewater Department ("MWWD").

Mr. Schachter asked Mr. Zeleny to describe to whom he reports. Mr. Zeleny responded that prior to his new appointment, he reported to David Schlesinger (former Director of MWWD), Susan Hamilton (former Director of MWWD), Bill Hanley (Deputy Director for Contract Services, MWWD) and Scott Tulloch (Director of MWWD) in the MWWD. He also reported to Ted Bromfield (former Assistant City Attorney) and Kerri Katz (City Attorney's Office), and later Salt in the City Attorney's Office. He said that three attorneys in the City Attorney's Office were assigned to wastewater: Bromfield (who was involved with regulatory), Zeleny (who was involved with construction and contracts), and Salt (who dealt with financing and bonds across all departments including wastewater bonds).

State Revolving Fund Loans

Mr. Schachter asked Mr. Zeleny to explain his role in State Revolving Fund ("SRF") loans and grants. Mr. Zeleny responded that he works with Richard Enriquez (Grants Administrator for MWWD) from the MWWD on SRF loans and said that Enriquez is the "point man" on SRF. He works on some City Council actions to pursue SRF loans. Mr. Schachter asked Mr. Zeleny if he reviews and signs SRF applications. He said that there is "not a whole lot of review" of SRF agreements because they are provided by the State. He does not sign them. In 1999, an issue arose regarding the SRF agreements because the State financed money for SRF and additional language had to be inserted into the SRF agreements. This caused the SRF program to be shut down for a while. Mr. Schachter asked Mr. Zeleny who reviewed SRF agreements on behalf of the City. He responded that he "is sure" SRF agreements were reviewed initially but he did not know by whom. If there was an SRF agreement in 2000, he probably was responsible for reviewing it. The SRF agreement is one standard agreement that is supplemented for each individual project. Mr. Schachter asked Mr. Zeleny if he was aware of a covenant in the SRF agreement concerning the State sewer rate guidelines. Mr. Zeleny responded that he was not aware of such a covenant.

Involvement in Sewer Rate Structure

Mr. Schachter asked Mr. Zeleny about his knowledge of and involvement in the sewer rate structure issue. He responded that he had no knowledge or involvement in the sewer rate structure issue but had heard about it primarily through discussion regarding the *Shames* litigation. He heard there was a closed session and maybe more than one. He also heard since the Shames case was filed that there was a Cost of Service Study ("COS") and perhaps more than one. Mr. Schachter asked Mr. Zeleny where he obtained this information. He said he received this information from Bromfield and John Riley (Deputy City Attorney).

Proposition 218

Mr. Schachter asked Mr. Zeleny whether he recalled discussions concerning the need to comply with Proposition 218 as it related to sewer rates. Mr. Zeleny responded that he recalled discussions about whether, if sewer rates were raised, there was a need to comply with Proposition 218. The City Attorney's Office decided to "play it safe": comply with the 218 noticing provisions and "see what happens."

Mr. Schachter asked Mr. Zeleny to describe the relationship between Proposition 218 and the State's requirements for the City's rate structure. Mr. Zeleny responded that he

learned through Shames that under 218, the City had to have a fair rate structure in terms of actually providing services. He did not know how to have such a structure. Proposition 218 also involves dealing with charges for sewage including UV treatment and other components. He said there are some similarities between 218 and the State requirements.

Involvement With Bond Disclosures

Mr. Zeleny was shown Exhibit 1, an undated two-page document that appears to be a selection of questions and answers labeled, "Attachment 7," and Exhibit 2, an excerpt of the February 1, 1997 Sewer Revenue Bond Official Statement. When asked by Mr. Schachter if he recognized Exhibit 1, Mr. Zeleny stated that he did not but explained that it was possibly passed down to him from Bromfield or Salt. Mr. Schachter asked Mr. Zeleny about his involvement with the sewer bond disclosures. He responded that in 1997, he was asked to provide an update for the bond disclosure regarding construction claims that had not yet ripened into litigation. He was not involved otherwise in the bond disclosure.

Mr. Schachter asked Mr. Zeleny to describe his involvement with the 2003 Preliminary Official Statement ("POS"). Mr. Zeleny responded that he recalled the 2003 POS being pulled but did not know why it was pulled. He heard it was pulled because of a pension footnote. He was not involved in the POS. His only involvement with bond issuances was when he was asked to provide litigation updates. When asked by Mr. Schachter whether he reviewed POS regulatory language, he said he never examined POS language regarding sewer regulatory requirements.

Voluntary Disclosures

Mr. Schachter asked Mr. Zeleny about his involvement with voluntary disclosures. Mr. Zeleny responded he had no involvement with such disclosures. He learned about the sewer voluntary disclosure from the news.

Shames Litigation

Mr. Schachter asked Mr. Zeleny about the status of the Shames litigation. Mr. Zeleny responded that the City has "brought in" Kelco and ISP into the litigation and the companies have demurred and filed motions.

Awareness of Noncompliance and the COS

Mr. Schachter asked Mr. Zeleny if he was aware of the City's noncompliance with the State requirements or of the COS in 1997-1999. He responded that during the 1997-1999 time frame he was not aware of noncompliance with State requirements or of the COS. He speculated that Bromfield would have known. By tangentially working on the Shames litigation, Zeleny recently came to know that Salt knew about the noncompliance and the COS during or close to the 1997-1999 time period. Mr. Schachter asked Mr. Zeleny if he was aware that there is a COD/BOD (chemical oxygen demand/biological oxygen demand; *i.e.,* organics) component in the State-approved rate structure. Mr. Zeleny responded that he was not sure if there is a COD/BOD component in the State-approved rate structure.

Mr. Zeleny was shown Exhibit 3, a January 31, 2002 email from Ron Blair (Revenue Program Specialist for the State Water Resources Control Board) to Enriquez re: "Requirements for draft revenue program." Mr. Schachter asked Mr. Zeleny whether he recalled receiving this email. Mr. Zeleny responded that he inherited all of Bromfield's files and this may have been one of them. He did not remember the email. He recalled the wet weather facility but had no involvement in it.

SB 1132

Mr. Zeleny was shown Exhibit 4, an August 2, 1999 email from Lisa Foster to himself re: "SB 1132." Mr. Schachter asked Mr. Zeleny to explain what SB 1132 is. He said he did not remember what SB 1132 was. He speculated that perhaps it was a request from the Intergovernmental Relations Department, which typically asks for legal analysis of bills.

Kelco

Mr. Schachter asked Mr. Zeleny to describe Kelco's involvement with the sewer rate structure. He responded that when the Council approved the sewer rate changes, Kelco and about fifty Kelco employees attended a Council meeting and complained. The Mayor directed the City Manager to meet with Kelco to see if the City could reduce the impact of the increased rates on Kelco. Mr. Schachter asked Mr. Zeleny if he was aware of Kelco making political contributions to the Mayor and Council. He responded that he did not hear of Kelco providing political contributions but said that the City Attorney's Office may be investigating that issue now. He is not personally involved in investigating that issue.

Mr. Zeleny was shown Exhibit 5, a February 12, 2004 email from Salt to Zeleny re: "Richmond Shasta Analysis," and Exhibit 6, a March 2, 2005 email from Salt to Zeleny re: "FW: KELCO Proposed Arrangement."

Mr. Zeleny was shown Exhibit 7, a July 12, 2005 email from himself to Tulloch, Anita Noone (Assistant City Attorney), and himself re: "Confidentiality Agreement." Mr. Schachter asked Mr. Zeleny to describe the confidentiality agreement issue discussed in Exhibit 7. Mr. Zeleny responded that when they met with Kelco internally to discuss Kelco's concerns, Kelco asked for a confidentiality agreement regarding trade secrets. The City drafted one but there was a provision in the agreement that stated that if anyone asked for any public records, the City would inform Kelco in advance. When subpoenas arrived at the City Attorney's Office, Mr. Zeleny discussed the confidentiality agreement with City Attorney Michael Aguirre, and Aguirre told him not to inform Kelco of the subpoenas and told him that the confidentiality agreement was not applicable. Mr. Zeleny said that Exhibit 7 informed the MWWD that the City was not abiding by the confidentiality agreement.

Legal Updates

Mr. Zeleny was shown Exhibit 8, a June 16, 2005 email from Kelly Salt to Charles Yackly (Acting Director, Water Department), Frank Belock, John Kirk, Lori Girard, Mark Blake, Richard Mendes (Deputy City Manager), Tulloch, Bromfield, and himself, cc'ing Prescilla Dugard re: "Fwd: [CCA] HJTA v. Fresno." Mr. Schachter asked why Mr. Zeleny

received Exhibit 8. Mr. Zeleny responded that Salt used to be head of the contract practice group and if there was an issue that was relevant to public works, she would inform him of new cases.

Chronology

Mr. Zeleny was shown Exhibit 9, a July 27, 2005 email from himself to Dennis Kahlie (Utilities Finance Administrator), Hedy Griffiths (Supervising Management Analyst, Agency Contracts, MWWD), Enriquez, Riley, Salt, and Bromfield re: "UCAN lawsuit chronology," attaching a draft "Chronology of major events in adoption of organics component in City's sewer rate structure." Mr. Zeleny said that UCAN stands for Utilities Consumers Action Network and is another name for Shames. Mr. Schachter asked Mr. Zeleny why there is a notation in the chronology of a January 22, 2002 Closed Session. Mr. Zeleny responded that he received that information from examining documents in a binder belonging to Bromfield and that Riley may still have Bromfield's binder.

Conclusion

Mr. Schachter asked Mr. Zeleny if there was any other information he was aware of that he thought might be relevant to our investigation. Mr. Zeleny said "no." Mr. Schachter asked Mr. Zeleny if there was any improper conduct on the part of any City employees of which Zeleny is aware. Mr. Zeleny said "no." Mr. Schachter requested that Mr. Zeleny keep the contents of the interview confidential and that if Mr. Zeleny recalls any other information, he should contact us.

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EXHIBIT 1

Zeleny

Attachment 7

The following addresses information on the City's revenue program, the systemwide wastewater flow, and the Point Loma and South Bay projects that are included in the current rate case. The official statement for the City's latest bond sale of $250,000,000 is used as a reference document for all of the responses.

1. Does the City have an approved revenue program?

The City of San Diego generates collects fees and charges from its ratepayers to support the City's share of regional costs through a revenue program that complies with all of the state and federal requirements and has received formal approval from the State Water Resources Control Board. Page 23 of the official statement provides a discussion of the City's sewer service charge structure (revenue program).

Page 10 of the official statement identifies the rate covenant whereby the City must raise rates to a sufficient level to provide the required revenues necessary to support the operation and maintenance costs and meet all other requirements. This covenant will include any repayment of SRF loans as they would be considered an obligation of the City.

2. Identify the systemwide wastewater flow for the regional system.

Page 18 of the official statement shows the total annual system wastewater flow for the period FY1965 through FY1996.

3. Identify the costs associated with the Point Loma and South Bay Water Reclamation Plant (SBWRP) projects as part of the City's total capital improvement program.

Table 4 on page 28 of the official statement presents wastewater system capital improvement costs that are projected to be incurred during the period of July 1, 1996 through June 30, 2003.

The total budget cost of the Point Loma and SBWRP projects are:

	Cost	% of Total
Point Loma Plant Upgrade	$169 million	12%
SBWRP	$112.7 million	8%

As indicated on Table 4, $920.3 million in capital costs is anticipated to be incurred during the period July 1, 1997 through June 30, 2003. The total of projected capital

costs is included on Table 5 which identified the sources and uses of future capital expenditures.

The estimated cost of these projects to the users of the system cannot be determined since the City prepares its revenue program based on a combination of total expenditures, other revenues, grant funding, level of debt financing, and approved annual increases in user fees. The City has a very large capital program with a number of projects all which must be completed and are competing for funding from a limited pool of funds.

EXHIBIT 2

NEW ISSUES-BOOK-ENTRY ONLY

In the opinion of Orrick, Herrington & Sutcliffe LLP, Los Angeles, California and Lofton, De Lancie & Nelson, San Francisco, California, Co-Bond Counsel, based upon an analysis of existing laws, regulations, rulings and court decisions and assuming, among other matters, compliance with certain covenants, interest on the Series 1997 Bonds is excluded from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986 and is exempt from State of California personal income taxes. In the further opinion of Co-Bond Counsel, interest on the Series 1997 Bonds is not a specific preference item for purposes of the federal individual or corporate alternative minimum taxes, although Co-Bond Counsel observe that such interest is included in adjusted current earnings in calculating corporate alternative minimum taxable income. Co-Bond Counsel express no opinion regarding any other tax consequences related to the ownership or disposition of, or the accrual or receipt of interest on, the Series 1997 Bonds. See "TAX MATTERS."

$250,000,000

PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO

SEWER REVENUE BONDS, SERIES 1997A AND SERIES 1997B

(Payable Solely From Installment Payments Secured By Wastewater System Net Revenues)

Dated: February 1, 1997 — Due: May 15, as shown below

The Series 1997A Bonds and the Series 1997B Bonds (collectively, the "Series 1997 Bonds") are issuable by the Public Facilities Financing Authority of the City of San Diego (the "Authority") as fully registered bonds and when initially issued will be registered in the name of Cede & Co., as nominee of The Depository Trust Company, New York, New York ("DTC"). Purchases of the Series 1997 Bonds will be made in book-entry form only, in denominations of $5,000 or any integral multiple thereof, through brokers and dealers who are, or who act through, DTC Participants. Beneficial Owners of the Series 1997 Bonds will not be entitled to receive physical delivery of bond certificates so long as DTC or a successor securities depository acts as the securities depository with respect to the Series 1997 Bonds. So long as DTC or its nominee is the registered owner of the Series 1997 Bonds, reference herein to Bondholders are registered owners shall mean Cede & Co., as aforesaid, and payments of principal of and interest on the Series 1997 Bonds will be made directly to DTC by State Street Bank and Trust Company of California, N.A., as Trustee. Disbursement of such payments to DTC Participants is the responsibility of DTC and disbursement of such payments to the Beneficial Owners is the responsibility of DTC Participants. See "DESCRIPTION OF THE SERIES 1997 BONDS — Book-Entry-Only System."

Proceeds of the Series 1997A Bonds are to be applied to (i) pay design, engineering, land acquisition and construction costs of certain capital improvements to the Metropolitan System of the City of San Diego (the "City"), (ii) to fund a portion of the debt service reserve fund securing the Series 1997 Bonds and the Outstanding Parity Bonds (defined below) and (iii) to pay certain costs of issuance. So long as certain conditions are met, the City has the right to transfer the Metropolitan System facilities to a successor entity. Upon such transfer, the City's obligation to make Installment Payments relating to the Metropolitan System will be assumed by such successor entity and the City will no longer be responsible for such obligations. See "POSSIBLE TRANSFER OF OWNERSHIP OF METROPOLITAN SYSTEM."

Proceeds of the Series 1997B Bonds are to be applied to (i) pay design, engineering, land acquisition and construction costs of certain capital improvements to the Municipal System of the City, (ii) to fund a portion of the debt service reserve fund securing the Series 1997 Bonds and the Outstanding Parity Bonds and (iii) to pay certain costs of issuance.

The payment of principal of and interest on the Series 1997 Bonds when due will be insured by a municipal bond insurance policy to be issued simultaneously with the delivery of the Series 1997 Bonds by Financial Guaranty Insurance Company. See "SECURITY FOR THE SERIES 1997 BONDS — Bond Insurance" and "APPENDIX F — SPECIMEN MUNICIPAL BOND INSURANCE POLICY."

FGIC. Financial Guaranty Insurance Company

FGIC is a registered service mark used by Financial Guaranty Insurance Company, a private company not affiliated with any U.S. Government agency.

The Series 1997 Bonds are special, limited obligations of the Authority payable solely from and secured by Installment Payments to be made by the City to the Authority from Net System Revenues pledged and assigned pursuant to a Master Installment Purchase Agreement, as amended and supplemented by the 1993-1 Supplement, the 1995-1 Supplement and the 1997-1 Supplement to the Master Installment Purchase Agreement, each between the Authority and the City. The Series 1997 Bonds are issued on a parity with the Authority's Sewer Revenue Bonds, Series 1995 and Series 1993 (collectively, the "Outstanding Parity Bonds").

The obligation of the City to make Installment Payments does not constitute an obligation of the City for which the City is obligated to levy or pledge any form of taxation or for which the City has levied or pledged any form of taxation. Neither the pledge made by the Authority, nor the obligation of the City to make Installment Payments, creates a legal or equitable pledge, charge, lien or encumbrance upon any of the City's property, or upon its income, receipts or revenues other than Net System Revenues. The Authority has no taxing power.

The Series 1997 Bonds are subject to optional and mandatory redemption prior to maturity as described herein.

This cover page contains certain information for general reference only. It is not a summary of the issue. Investors are advised to read the entire Official Statement to obtain information essential to the making of an informed decision.

The Series 1997 Bonds will be offered when, as and if issued and received by the Underwriters, subject to the approval of validity by Orrick, Herrington & Sutcliffe LLP, Los Angeles, California and Lofton, De Lancie & Nelson, San Francisco, California, Co-Bond Counsel, and to certain other conditions. Certain legal matters in connection with the Series 1997 Bonds will be passed upon by Curls, Brown & Roushon, Los Angeles, California, Underwriters' Counsel. Casey Gwinn, Esq., City Attorney of the City of San Diego and General Counsel to the Authority and Orrick, Herrington & Sutcliffe LLP, Los Angeles, California, Disclosure Counsel. It is expected that the Series 1997 Bonds will be available for delivery through DTC in New York, New York on or about March 6, 1997.

SMITH BARNEY INC.

PAINEWEBBER INCORPORATED

BANCAMERICA SECURITIES, INC.

ARTEMIS CAPITAL GROUP, INC.

994. See "ACTIONS UNDER THE CLEAN WATER ACT - Relief from Secondary Treatment Requirements." ...e NPDES permit has a five-year life and all conditions imposed by the permit are being successfully met.

To comply with other federal regulations concerning the discharge of waste materials into the Wastewater System, the City must administer and enforce industrial pretreatment limitation standards upon industrial users of the system. The City has had an industrial waste program in effect since the early 1970s. The City's industrial waste ordinance sets forth water quality standards that industrial users must meet and provides enforcement procedures for violators. The Industrial Waste Division of the MWWD is currently responsible for monitoring an average of 1,000 permitted industries located in the metropolitan service area. In addition, each Participating Agency is required to permit and monitor all industries within its respective service area. While each Participating Agency as a condition of its respective Sewage Disposal Agreement is required to comply with quality standards set by the City, the City, at the urging of the EPA, has required separate pretreatment agreements with each Participating Agency to ensure industrial pretreatment requirements. All Participating Agencies have entered into such pretreatment agreements.

As a condition of having received federal EPA grant funds under the Clean Water Act for the planning and construction of various improvements at its Point Loma Plant, the City is subject to additional regulatory requirements. Among the grant-related requirements are guidelines which must be followed concerning planning methodologies, design criteria, construction activities, and the operation, maintenance and financing of facilities. As another condition of its past receipt of federal grants, the City and the Participating Agencies must have approved sewer service charge structures. Such service charge structures require the recovery of annual operations, maintenance and replacement costs from users of the system in a proportionate manner according to the customer's level of use. Such factors as volume, infiltration/inflow, delivery flow rate, and strength of sewage are to be considered for determining proportionate use. Sewer service charge rates for all retail users are reviewed annually and established at a level necessary to generate sufficient revenues to recover the annual operations, maintenance and replacement costs. With the exception of the Participating Agencies which are charged rates purely based on flow, sewer service charge rates for users are established to recognize the volume and strength characteristics of wastewater contributed to the Wastewater System. The rate structure has been reviewed by the State Board and no grant funds or costs under grant funded programs have been disallowed based on the nature of the rate structures.

In addition to federal requirements, the City must also comply with water quality based effluent State requirements, otherwise known as the State Ocean Plan. The City believes that it is in compliance with the State Ocean Plan. Another State law concerned with control of water quality is the Porter-Cologne Water Quality Control Act of 1969, as amended. The Porter-Cologne Act directly addresses the problem of water reclamation and reuse. A declared policy of the law is that the people of the State have a primary interest in the development of facilities to reclaim wastewater to supplement existing surface and underground water supplies in order to meet their water requirements. The legislative intent was to undertake all possible development of water reclamation facilities to make reclaimed water available for use. The law requires the State Department of Health Services to establish statewide reclamation criteria for each type of use where such use involves public health. The City's proposed water reclamation projects are subject to the Porter-Cologne Act and are being designed in consultation with State officials to comply with its requirements.

Recent Compliance Actions and Other Litigation

On February 8, 1996, the Regional Board accepted a proposal offered by the City to resolve all outstanding enforcement and liability issues relating to alleged sewer overflows involving the Wastewater System and inadequate reporting of such events. Without admitting any liability for pending issues related to sewer overflows and reporting, the City agreed to a cash payment of $350,000 and approximately one million dollars total in environmental credit projects extending over five years, from 1996 to 2001. This settlement resulted in a full satisfaction of all issues between the City and the Regional Board through the date of settlement. To date, all requirements of the settlement have been met and there are no pending complaints involving the City before the Regional Board.

In another action, the Surfrider Foundation filed a petition in Superior Court for a writ of mandate against the City on June 29, 1995. The petition alleges that the City did not comply with the California Environmental

Table 4

WASTEWATER SYSTEM CAPITAL IMPROVEMENT PROGRAM COSTS
(July 1, 1996 through June 30, 2003)

Projects	Total Budget (In Millions)	Expended Through June 30, 1996 (In Millions)	Remaining Cost[1] (In Millions)	Percent Complete[2]
Metropolitan System Projects				
Metro Biosolids Processing Projects	$329.6	$223.4	$106.2	68%
North City Water Reclamation Plant	189.3	174.9	14.4	92%
Point Loma Plant Upgrade	169.0	72.6	96.4	43%
Point Loma Outfall	68.2	64.2	4.0	94%
South Bay Projects				
Water Reclamation Plant	112.7	8.9	103.8	8%
Sewage Conveyance System	57.1	30.5	26.6	53%
Ocean Outfall	187.1	92.7	94.4	50%
Major Interceptors (North and South)	115.5	75.8	35.7	68%
Other Metropolitan System Projects	175.5	96.8	78.7	55%
Subtotal Metropolitan System Projects	1,404.0	839.8	560.2	60%
Municipal System Projects	N/A	N/A	360.1	N/A
Total			920.3	

[1] The dollar amounts in this column (a) reflect the remaining amounts in the budget as of July 1, 1996, (b) give effect to assumed rates of inflation during the period covered, and (c) reflect amounts expected to be set aside for outstanding contracts during the period indicated without regard to the timing of expenditures of such amounts.

[2] The percentages in this column reflect the amounts spent on a project through June 30, 1996 compared to the total budget from origination of the project.

Capital Improvement Projects

1. *Metropolitan System*

Metro Biosolids Processing Projects. This project consists of the Metro Biosolids Center, FIRP Pump Station, FIRP Phase II Digested Sludge and Centrate Pipeline, North City Raw Sludge and Water Pipelines, and the Biosolids Demonstration Project. The recommended overall sludge management plan consists of sludge collection at each treatment plant, digestion at the Point Loma Plant of Point Loma Plant sludge and digestion of sludge for the reclamation plants at the Metro Biosolids Center. Digested sludge from the Point Loma Plant and undigested sludge from the North City Water Reclamation Plant will be pumped to the Metro Biosolids Center. A for-profit enterprise will operate a cogeneration facility at the Metro Biosolids Center. A sludge drying facility is also proposed to be located at the Metro Biosolids Center. The sludge drying facility may be operated by a for-profit contractor to produce agricultural fertilizer pellets to be sold by the contractor. Other beneficial use options such as composting and direct land application are being considered and/or co-disposal in permitted solid waste landfills. Energy to operate the Metro Biosolids Center is currently planned to be provided using methane gas. The Metro Biosolids Center will be located at Miramar Naval Air Station, north of the City, under a lease from the U.S. Navy to the City.

Historical Wastewater System Flow

Table 2 below shows total annual system flow through the Point Loma Plant and Escondido Plant.

Table 2
TOTAL ANNUAL WASTEWATER SYSTEM FLOW IN MILLION GALLONS

Fiscal Year Ended June 30	City Flow through Point Loma Plant	Participating Agency Flow through Point Loma Plant	City Flow through Escondido Plant	Total System Flow	Average MGD For The Year
1965	16,440	6,703	420	23,563	65
1970	19,950	9,658	709	30,317	83
1975	26,125	13,269	562	39,956	109
1980	36,708	17,572	944	55,224	151
1985	39,397	20,246	1,218	60,861	167
1990	48,628	20,836	1,405	70,869	194
1991	45,602	19,218	1,365	66,185	181
1992	46,030	18,115	1,177	65,322	179
1993	48,680	20,092	1,318	70,090	192
1994	45,043	19,111	1,310	65,464	179
1995	46,802	19,724	1,321	67,847	186
1996	46,848	19,115	1,325	67,288	184

For the fiscal year ended June 30, 1996, the Metropolitan System (180 mgd) and the Escondido Plant (4 mgd) on a daily basis treated and disposed of more than 184 million gallons of sewage per day generated by approximately 1.9 million residents and businesses within the Metropolitan System service area and the Rancho Bernardo service area.

The Participating Agencies and Sewage Disposal Agreements and Other Agreements

The Metropolitan System provides "wholesale" treatment services, including some sewage transport, treatment and disposal operations to other cities and districts pursuant to Sewage Disposal Agreements with such entities (the "Sewage Disposal Agreements"). The Cities of Chula Vista, Coronado, El Cajon, Imperial Beach, La Mesa and National City, and the Lemon Grove Sanitation District and the Spring Valley Sanitation District (the "Original Participating Agencies") entered into the Sewage Disposal Agreements in 1960. Subsequent to that time the City entered into Sewage Disposal Agreements with the Cities of Del Mar and Poway and the Lakeside/Alpine Sanitation District, the Otay Water District, the Padre Dam Municipal Water District and the Wintergardens Sewer Maintenance District (the "Later Participating Agencies"). The Original Participating Agencies and the Later Participating Agencies are collectively referred to as the "Participating Agencies." The Participating Agencies and the City are responsible for the "retail" collection operations within their respective jurisdictions. The Participating Agencies also transport collected sewage through large trunk lines to the Metropolitan System. The collection systems and many of the transport trunk lines are owned by the individual Participating Agencies. The City bills the Participating Agencies quarterly on the basis of budgeted estimates and sewage flows. In the following fiscal year, when actual costs and flows are known and apportioned to each Participating Agency, billing adjustments are made to correct for any under or over charges in the previous year.

Ta.

SOURCES AND USES OF FUNDS FOR CAPITAL EXPENDITURES
WASTEWATER SYSTEM CAPITAL IMPROVEMENT PROGRAM
(In Thousands of Dollars)
Fiscal Years Ending June 30, 1997 to 2003

	1997	1998	1999	2000	2001	2002	2003	Total[3]	1996 (Actual)[3] Unaudited
SOURCE OF FUNDS									
Beginning Balance of Construction Fund	$155,268	$ 0	$ 0	$ 0	$ 0	$ 0	$ 0	$155,268	$ 13,380
New Bond Issues	250,000	161,092[4]	179,103	79,543	0	0	0	669,738	350,000
Grant Receipts	27,909	9,695	0	0	0	0	0	37,604	33,691
Contributions in Aid	50,972	19,611	8,427	0	0	0	0	79,010	14,693
Pay-as-You-Go	24,769	25,051	23,043	6,776	70,573	52,473	61,232	263,917	77,838
TOTAL SOURCES	$508,918	$215,449	$210,573	$ 86,319	$ 70,573	$ 52,473	$61,232	$1,205,573	$489,602
USES OF FUNDS									
Issue Costs	$ 3,127	$ 2,013	$ 2,239	$ 995	$ 0	$ 0	$ 0	$ 8,374	$ 8,956
Debt Service Reserve Fund	19,144	12,336	13,715	6,091	0	0	0	51,286	22,961
Reimbursement of Prior Capital Expenditures	0	0	0	0	0	0	0	0	14,157
Contribution to Construction Fund	0	0	0	0	0	0	0	0	155,268
Capital Expenditures[1][2][5]	486,649	201,099	194,619	79,234	70,573	52,473	61,232	1,145,879	288,260
TOTAL USES	$508,918	$215,448	$210,573	$ 86,320	$ 70,573	$52,473	$61,232	$1,205,537	$489,602

(1) Capital Expenditures by System	1997	1998	1999	2000	2001	2002	2003	Total	1996 (Actual)
Municipal System	73,128	39,357	54,934	45,614	52,674	50,042	58,427	374,176	48,514
Metropolitan System	413,520	161,743	139,685	33,620	17,899	2,431	2,805	771,703	239,746
Total System	$486,648	$201,100	$194,619	$ 79,234	$ 70,573	$52,473	$61,232	$1,145,879	$288,260

(2) Projected amounts to be set aside during this period for contracts for the Wastewater System Capital Improvement Program aggregate approximately $970.3 billion. See Table 4. Table 5 describes projected cash expenditures for Wastewater System Capital Improvement Program projects rather than projected set asides.

(3) Reflects total of projected sources and uses for fiscal years ending June 30, 1997 through June 30, 2003.

(4) Included to comply with the Continuing Disclosure Agreement entered into in connection with the issuance of the Series 1995 Bonds.

(5) See "FINANCIAL PROJECTIONS" regarding the possible use of borrowings under the State Revolving Fund Program.

EXHIBIT 3

From: "Ron Blair" <Blairr@cwp.swrcb.ca.gov>
To: <rjenriquez@sandiego.gov>
Date: Thu, Jan 31, 2002 10:25 AM
Subject: Requirements for draft revenue program

The information I'm looking for is:

1. What is the increase in annual O&M costs for the wet weather facility(s)?
2. How are the increased annual O&M costs divided into flow, bod (if appropriate) and TSS if appropriate)?
3. On what basis are these increased costs passed on to the City's residential, commercial and industrial wastewater dischargers? What portion and on what basis are these increased costs passed on to the surrounding agencies receiving wastewater treatment from San Diego?
4. Will the existing interagency contract for wastewater treatment require an amendment due to construction and operation of the wet weather facility(s)?

I'm not sure this is an all inclusive list, but it should be a good place to start from

EXHIBIT 4

:mail message text
)bject type: [GW.MESSAGE.MAIL]
:tem Source: [Received]
Message ID: [3E71968D.Demo-dom.Demo-PO.100.167676C.1.258.1]
'rom: [Lisa Foster]
:o: []
Subject: [Re: SB 1132]
:reation date: [8/2/1999 2:07:08 PM]
[n Folder: [Legis Anal]
\ttachments: None
Message: [
[om, 'trina Blake from Water sent Kelly and I a copy of the proposed legislation, but [have not had a chance to look at it and form an independent opinion. However,)ennis Kahlie from Financing Services has sent Kelly and I a message stating that the :ity should strongly oppose the legislation, in part because it is problematic under ?rop. 218. After we have all had a chance to review, we should have a meeting to form a consensus. (Maybe we could stay after and meet after the next unit meeting?)
:isa
>>> Thomas Zeleny 08/02 10:12 AM >>>
Hi Lisa & Kelly,

I'm trying to arrive at a consensus on what position, if any, the City should take on SB 1132 (we got one of those legislative analysis requests). Do you think we should take a position on this? Will it have any significant effect on how the H2O department operates? I'm checking with Ted on the Sewer side.

--TomZ

]

EXHIBIT 5

Mail

Close

Previous | Next

From: Kelly Salt
To: Zeleny, Thomas
CC:
Date: 2/12/2004 11:00 AM
Subject: Re: Richmond%20v.%20Shasta%20Analysis

Yeah, that's what I always say. Actually, it is a pretty bizarre analysis. Go back and read it if you didn't read it all the way through.

>>> Thomas Zeleny 02/12/04 10:54AM >>>
awww, what do they know anyway? ;-)

>>> Kelly Salt 2/12/04 10:48:45 AM >>>
No, the court concluded that the SERVICE charges ARE subject to 218. They concluded, however, that the CAPACITY charges are NOT subject to 218. You have to keep reading the case, it's at the very end in dicta justifying their decision re the fire suppression and capacity charges are not developer fees. YIKES!

>>> Thomas Zeleny 02/12/04 10:45AM >>>
I ', don't you mean they are NOT subject to 218??

>>> Kelly Salt 2/12/04 10:42:06 AM >>>
The California Supreme Court issued a decision in Richmond v. Shasta Community Services . While the issue in the case was primarily concenrning whether capacity charges are subject to Prop 218, in dicta the Court concluded that water and sewer service charges are subject to Prop 218. Attached is a good analysis of the case prepared by Michael Coluntuono of the League of California Cities which I thought may be of interest to you. I have already forwarded to the departments a copy of the case and this analysis. I will forward to you via separate e-mail a copy of the decision for your files. If you click on the link below you can view the League's analysis. Let me know if you have any questions.

http://www.clrlawfirm.com/papers/Richmond%20v.%20Shasta%20Analysis.pdf

9 Cal.Rptr.3d 121

Page 1

32 Cal.4th 409, 83 P.3d 518, 9 Cal.Rptr.3d 121, 2004 Daily Journal D.A.R. 1146, 2004 Daily Journal D.A.R. 1429

(Cite as: 32 Cal.4th 409, 83 P.3d 518, 9 Cal.Rptr.3d 121)

P

Briefs and Other Related Documents

Supreme Court of California
Jerry **RICHMOND** et al., Plaintiffs and Appellants,
v.
SHASTA COMMUNITY SERVICES DISTRICT
, Defendant and Respondent.
No. S105078.

Feb. 9, 2004.

Background: Property owners brought action challenging constitutionality of resolution adopted by water district that increased connection fee charged to new users and continued unchanged, as part of connection fee, a fee for fire suppression. The Superior Court, Shasta County, No. 0134636, Richard A. McEachen, J., upheld enactment. Property owners appealed. The Court of Appeal affirmed in part and reversed in part. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:
(1) district's capacity charge, imposed on applicants for new service connections, was not an "assessment" subject to state constitutional restrictions;
(2) district's fee for fire suppression as part of new connection fee was not subject to constitutional restrictions on fees; and
(3) district could amend ordinance establishing new connection fees by resolution.
Judgment of the Court of Appeal reversed and matter remanded to that court with directions.

Opinion, 116 Cal.Rptr.2d 343, superseded.

West Headnotes

[1] Waters and Water Courses ⇐203(1)
405k203(1) Most Cited Cases
Water district's capacity charge, imposed on applicants for new service connections, was not an "assessment" subject to state constitutional restrictions on assessments, since district could only estimate number of connections and could not identify specific parcels for which new applications would be made, as required by constitutional provision. West's Ann.Cal. Const. Art. 13D, §§ 2, 4 .
See 9 Witkin, Summary of Cal. Law (9th ed. 1989) Taxation, §§ 110A, 110B; Cal. Jur. 3d, Property Tax, § 4.

[2] Constitutional Law ⇐12
92k12 Most Cited Cases
The principles of constitutional interpretation are similar to those governing statutory construction.

[3] Constitutional Law ⇐13
92k13 Most Cited Cases
The aim of constitutional interpretation is to determine and effectuate the intent of those who enacted the constitutional provision at issue.

[4] Constitutional Law ⇐14
92k14 Most Cited Cases
To determine intent of enactors of a constitutional provision, the Supreme Court begins by examining the constitutional text, giving the words their ordinary meanings.

[5] Constitutional Law ⇐12
92k12 Most Cited Cases
Courts construe constitutional phrases liberally and practically; where possible they avoid a literalism that effects absurd, arbitrary, or unintended results.

[6] Constitutional Law ⇐19
92k19 Most Cited Cases

[6] Statutes ⇐179

361k179 Most Cited Cases

[6] Statutes ⇐212.6
361k212.6 Most Cited Cases
Rule, holding that when a term has been given a particular meaning by a judicial decision it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions, does not apply when the statute or constitutional provision contains its own definition of the term at issue; if the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.

[7] Waters and Water Courses ⇐203(1)
405k203(1) Most Cited Cases
Water district's capacity charge, imposed on applicants for new service connections, was not a "development fee"; district had no authority to approve or disapprove property development, and a property owner could request a new service connection without proposing any new development.

[8] Waters and Water Courses ⇐203(1)
405k203(1) Most Cited Cases
Water district's fee for fire suppression as part of new connection fee was not subject to constitutional restrictions on fees, since it was not imposed as an incident to ownership; although supplying water was a property-related service within constitutional definition of a fee or charge, a water service fee was a "fee or charge" only if it was imposed upon a person as an incident of property ownership, and making a new connection to the system was not such imposition, since it resulted from an owner's voluntary decision to apply for the connection. West's Ann.Cal. Const. Art. 13D, §§ 2(e), 3(b), 6(a, b); West's Ann Cal.Gov.Code §§ 61621, 61621.3.

[9] Waters and Water Courses ⇐203(1)
405k203(1) Most Cited Cases
Water district could amend ordinance establishing new connection fee by resolution under authority of Mitigation Fee Act, which allowed such action by ordinance or resolution; district was not subject to statute requiring sewage system actions to be enacted by ordinance. West's Ann.Cal.Gov.Code § 66016(b); West's Ann.Cal.Health & Safety Code § 5471.

*****123 *414 **519** Law Offices of Walter P. McNeill and Walter P. McNeill, Redding, for Plaintiffs and Appellants.

Trevor A. Grimm, Los Angeles, Jonathan M. Coupal, Sacramento, and Timothy A. Bittle for Howard Jarvis Taxpayers Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton and David P. Lanferman, San Francisco, for California Building Industry Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Law Office of David L. Edwards, David L. Edwards, Redding; Colantuono, Levin & Rozell, ****520** Michael G. Colantuono and Sandra J. Levin, Los Angeles, for Defendant and Respondent.

Betsy Strauss, City Attorney (Rohnert Park) for 84 California Cities, the Association of California Water Agencies and the California State Association of Counties as Amici Curiae on behalf of Defendant and Respondent.

Law Office of William D. Ross and William D. Ross, Los Angeles, for California Fire Chiefs Association as Amicus Curiae on behalf of Defendant and Respondent.

KENNARD, J.

In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act, which added articles XIII C and XIII D to the California Constitution. (See ***415***Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 835, 102 Cal.Rptr.2d 719, 14 P.3d 930.) Article XIII D of the state Constitution (hereafter article XIII D) specifies various restrictions and requirements for assessments, fees, and charges that local governments impose on real property or on persons as an incident of property ownership. Here, the main issue is whether a charge that a local water district imposed as a condition of making a new

connection to the water system, and that the district used to finance capital improvements to the water system, is subject to the restrictions of article XIII D. Other questions presented are whether article XIII D prohibits a local water district from continuing to include in the new connection fees a fire suppression charge, the proceeds of which are used to purchase firefighting and emergency medical equipment for the district's volunteer fire department, and whether an ordinance imposing a water connection fee may be amended by a resolution.

On these questions, we conclude: (1) a capacity charge imposed as a condition for making a new connection to a water system, the proceeds of which are used to finance capital improvements, is not an assessment within the meaning of article XIII D, and thus it is not subject to article XIII D's restrictions on assessments; (2) a fire suppression fee imposed as a condition for making a new connection to a water system, the proceeds of which are used to purchase firefighting and emergency medical ***124 equipment, is not a property-related fee or charge under article XIII D, and thus it is not subject to article XIII D's prohibition against property-related fees and charges for general governmental services; and (3) an ordinance enacted by a community services district to impose a water connection fee may be amended by a resolution. Because these conclusions are consistent with the trial court's judgment but inconsistent with part of the Court of Appeal's opinion, we will reverse that court's judgment with directions to affirm the trial court's judgment.

I. FACTS AND PROCEDURAL HISTORY

Because neither party petitioned the Court of Appeal for a rehearing, we take the facts largely from that court's opinion. (See Cal. Rules of Court, rule 28(c)(2).)

Defendant Shasta Community Services District (the District) is a local public entity organized under the community services district law (Gov.Code, § 61000 et seq.). It operates a water system for residential and commercial users and a volunteer fire department that provides both fire suppression and emergency medical services. In February 1994, the District adopted an ordinance (No. 1-94) establishing a "standard connection fee" of $2,000, plus the cost of a water meter, for new water service connections. *416 According to the ordinance, this fee included a capacity charge [FN1] of $600 for future improvements to the water system and a fire suppression charge of $400. The ordinance did not expressly allocate the remaining $1,000, but one may infer that it covered the cost of installing the water service connection because the ordinance also provided that if the water main was not on the same side of the street or highway as the property to be served, "the District will charge the actual **521 cost of the connection to the extent such cost exceed[s] the sum of $1,000."

> FN1. The Government Code defines a "capacity charge" as "a charge for facilities in existence at the time a charge is imposed or charges for new facilities to be constructed in the future that are of benefit to the person or property being charged." (Gov.Code, § 66013, subd. (b)(3).)

In November 1997, the District adopted a resolution (No. 10-97) to amend this ordinance. According to the resolution, applicants for new water service connections would be required to pay: (1) a "standard connection fee"; (2) the actual cost of a water meter; and (3) if the property owner chose to have the District install the service connection, the "actual cost of the materials, labor, and overhead" for installing the "entire service connection including the meter, line setter, meter box, appurtenant equipment, and mainline extension, if any." The "standard connection fee" consisted of a $3,176 capacity charge for capital improvements to the water system and a $400 fire suppression charge. The resolution stated that the $3,176 capacity charge was "based upon estimated project costs of $762,300 for future improvements assigned to the new development of 240 future connections which equals $3,176 per connection."

In March 1998, plaintiffs Jerry Richmond, Linda Panich, Hank Edelstein, and Victoria Edelstein, both individually and doing business as a joint

venture, brought this action to test the validity of the resolution increasing the fees for new connections. (Code Civ. Proc., § 860; Gov.Code, §§ 66013, 66022.) They alleged that they owned real property within the District and also within an area proposed for annexation into the District. They challenged the resolution on many grounds, only three of which are relevant here: (1) The resolution imposed an assessment within the meaning of article XIII D, but ***125 the District had not satisfied the constitutional requirements for imposing an assessment; (2) the $400 fire suppression charge was a "fee" or "charge" within the meaning of article XIII D, and it violated article XIII D's prohibition against fees or charges for general governmental services; and (3) the 1994 ordinance could be amended only by another ordinance, not by a mere resolution. Plaintiffs requested a declaratory judgment that the resolution was void and a permanent injunction restraining the District from enforcing it.

*417 The action was tried to the court without a jury. At the trial, the District presented evidence showing, among other things, that the capital improvements to be funded by the $3,176 capacity charge, including a new 500,000-gallon storage tank, would both remedy existing deficiencies in the water system and expand the system's ability to provide service to new customers through new connections. The $3,176 charge was calculated by allocating 50 percent of the cost of the improvements to new connections and 50 percent to existing connections. Water customers throughout the district would benefit from the improvements, but customers in certain higher-elevation areas would receive somewhat less benefit than other customers. After considering the evidence, the superior court granted judgment for the District. The court concluded: (1) The connection fee imposed by resolution No. 10-97 is not a special assessment but a development fee exempt from article XIII D; (2) the fire suppression charge is merely the continuation of a fee imposed before article XIII D was enacted; and (3) the connection fee could legally be adopted by a resolution (enactment of an ordinance was not required).

On plaintiffs' appeal, the Court of Appeal affirmed the judgment, except as to the fire suppression charge. The court reasoned that the District's connection fee was not an assessment within the meaning of article XIII D because that constitutional provision by implication defines an assessment as a charge imposed on specific identified parcels, whereas the connection fee was not imposed on identified parcels. Because the connection fee was imposed only when a property owner requested a new service connection, the specific properties for which connections would be sought could not be identified (although the number of such requests could be estimated), and thus the connection charge could not be characterized as an assessment. The Court of Appeal also concluded that the connection fee, because it was incurred only when the owner voluntarily requested a new service connection, was properly characterized as a development fee, and as such it was exempt from the requirements of article XIII D.

**522 With respect to the fire suppression charge, however, the Court of Appeal accepted plaintiff's argument that it was a fee for general governmental services prohibited by section 6, subdivision (b)(5), of article XIII D. The Court of Appeal rejected the District's argument that this provision did not apply to fees authorized by laws enacted before article XIII D became effective, but only to fees that were newly enacted or increased thereafter.

Finally, the Court of Appeal concluded that the District could validly use a resolution to amend an ordinance.

*418 II. THE CAPACITY CHARGE

[1][2][3][4] To determine whether the District's $3,176 capacity charge, imposed only on applicants for new service connections, violates article XIII D's restrictions on assessments, we must interpret our state Constitution. "The principles of constitutional interpretation are similar to those governing statutory construction." ***126 (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122, 105 Cal.Rptr.2d 46, 18 P.3d 1198.) The aim of constitutional interpretation is to determine and effectuate the intent of those who

enacted the constitutional provision at issue. (*Ibid.*) To determine that intent, we begin by examining the constitutional text, giving the words their ordinary meanings. (*Ibid.*; accord, *Leone v. Medical Board* (2000) 22 Cal.4th 660, 665, 94 Cal.Rptr.2d 61, 995 P.2d 191.)

Section 2 of article XIII D defines an "assessment" as "any levy or charge upon real property ... for a special benefit conferred upon the real property...." (Art. XIII D, § 2, subd. (b).) It defines "special benefit" as "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large...." (*Id.*, § 2, subd. (i).)

Section 4 of article XIII D establishes procedures and requirements for assessments. A local public agency may not impose an assessment, as defined in article XIII D, unless: (1) the agency identifies "all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed" (art. XIII D, § 4, subd. (a)); (2) the agency obtains an engineer's report that supports the assessment (*id.*, § 4, subd. (b)); (3) the assessment does not exceed the reasonable cost of the proportional special benefit conferred on the affected parcel (*id.*, § 4, subds. (a) & (f)); and (4) after giving notice to affected property owners and holding a public hearing, the agency does not receive a majority protest based on ballots "weighted according to the proportional financial obligation of the affected property" (*id.*, § 4, subds. (c)-(e)).

To determine what constitutes an assessment under article XIII D, it is necessary to consider not only article XIII D's definition of an assessment, but also the requirements and procedures that article XIII D imposes on assessments. Article XIII D requires that an agency imposing an assessment identify "all parcels which *will* have a special benefit conferred upon them and upon which an assessment *will* be imposed." (Art. XIII D, § 4, subd. (a), italics added.) The agency then must give written notice of the proposed assessment to the owners of these identified parcels (*id.*, § 4, subd. (c)) and provide an opportunity for a protest using ballots "weighted according to the proportional financial obligation of the affected property" (*id.*, § 4, subd. (e)).

*419 Because the capacity charge is imposed only on property owners who apply for a new service connection, the District cannot identify the parcels upon which the capacity charge will be imposed. Here, the District *estimated* that there would be 240 new connection applications, but the District did not and could not *identify* the specific parcels for which new connection applications would be made. At most, the District can identify the parcels within its boundaries on which the capacity charge *would* be imposed *if* the owners applied for a service connection. But the matter is more complex, because many existing undeveloped parcels would likely be subdivided into an indeterminable number of smaller parcels, for each of which a connection might be requested, thus making it impossible to now determine "the proportional financial obligation of the affected property." And even this understates the problem, because owners of property outside the District's **523 boundaries may seek service connections by applying for annexation of their property into the District. Therefore, it is impossible for the District to comply with article XIII D's requirement that the agency identify the parcels on which the assessment will be imposed ***127 and provide an opportunity for a majority protest weighted according to the proportional financial obligation of the affected property.

We agree with the Court of Appeal that the proper conclusion to be drawn from this impossibility of compliance is that an assessment within the meaning of article XIII D must not only confer a special benefit on real property, but also be imposed on identifiable parcels of real property. Because the District does not impose the capacity charge on identifiable parcels, but only on individuals who request a new service connection, the capacity charge is not an assessment within the meaning of article XIII D.

[5] This construction is consistent with settled rules of constitutional interpretation. "Courts construe constitutional phrases liberally and practically;

where possible they avoid a literalism that effects absurd, arbitrary, or unintended results." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 327, 182 Cal.Rptr. 506, 644 P.2d 192; see also *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147, 43 Cal.Rptr.2d 693, 899 P.2d 79 ["a practical construction is preferred"].) Construing article XIII D's definition of assessment as applying only to charges imposed on identifiable parcels avoids the probably unintended result of prohibiting local water districts from imposing capacity charges, no matter how modest or reasonable, for new connections because of the inherent impossibility of identifying in advance the parcels for which new connections would later be requested.

This construction is also consistent with article XIII D's definition of an assessment as a "levy or charge *upon real property* ...." (Art. XIII D, § 2, *420 subd. (b), italics added.) [FN2] The District does not impose the capacity charge on real property as such, but on individuals who apply for new service connections. It is the applicant who must pay, and the District may not impose a lien or otherwise have recourse to the property to compel payment. Rather, the District simply does not initiate water service until the charge is paid. A charge that operates in this way cannot be described as a charge upon real property, within the meaning of article XIII D.

> FN2. In this regard, it may be instructive to compare article XIII D's definition of an assessment as a "levy or charge upon real property" (*id.*, § 2, subd. (b)) with its definition of a fee or charge as a "levy ... upon a parcel or upon a person as an incident of property ownership ..." (*id.*, § 2, subd. (e)). Although a property-related fee or charge may be imposed either on the property itself or upon the owner as an incident of ownership, a levy must be imposed on the property itself to qualify as an assessment under article XIII D.

Finally, this construction is consistent with the aim of Proposition 218 to enhance taxpayer consent. Here, the District proposed to divide the costs of new capital improvements between users receiving service through existing connections and users applying for new connections. This case concerns only imposition of costs on new connections. Presumably, any costs imposed on customers receiving service through existing connections would be subject to article XIII D's voter approval requirements, and thus their consent. Customers who apply for new connections give consent by the act of applying. Moreover, water connection fees are already subject to significant constraints under Government Code section 66013. [FN3]

> FN3. Government Code section 66013 provides:
> "(a) Notwithstanding any other provision of law, when a local agency imposes fees for water connections or sewer connections, or imposes capacity charges, those fees or charges shall not exceed the estimated reasonable cost of providing the service for which the fee or charge is imposed, unless a question regarding the amount of the fee or charge imposed in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two-thirds of those electors voting on the issue.
> "(b) As used in this section:
> "(1) 'Sewer connection' means the connection of a structure or project to a public sewer system.
> "(2) 'Water connection' means the connection of a structure or project to a public water system, as defined in subdivision (f) of Section 116275 of the Health and Safety Code.
> "(3) 'Capacity charge' means a charge for facilities in existence at the time a charge is imposed or charges for new facilities to be constructed in the future that are of benefit to the person or property being charged.
> "(4) 'Local agency' means a local agency as defined in Section 66000.
> "(5) 'Fee' means a fee for the physical

facilities necessary to make a water connection or sewer connection, including, but not limited to, meters, meter boxes, and pipelines from the structure or project to a water distribution line or sewer main, and that does not exceed the estimated reasonable cost of labor and materials for installation of those facilities. "(c) A local agency receiving payment of a charge as specified in paragraph (3) of subdivision (b) shall deposit it in a separate capital facilities fund with other charges received, and account for the charges in a manner to avoid any commingling with other moneys of the local agency, except for investments, and shall expend those charges solely for the purposes for which the charges were collected. Any interest income earned from the investment of moneys in the capital facilities fund shall be deposited in that fund.

"(d) For a fund established pursuant to subdivision (c), a local agency shall make available to the public, within 180 days after the last day of each fiscal year, the following information for that fiscal year:

"(1) A description of the charges deposited in the fund.

"(2) The beginning and ending balance of the fund and the interest earned from investment of moneys in the fund.

"(3) The amount of charges collected in that fiscal year.

"(4) An identification of all of the following:

"(A) Each public improvement on which charges were expended and the amount of the expenditure for each improvement, including the percentage of the total cost of the public improvement that was funded with those charges if more than one source of funding was used.

"(B) Each public improvement on which charges were expended that was completed during that fiscal year.

"(C) Each public improvement that is anticipated to be undertaken in the following fiscal year.

"(5) A description of each interfund transfer or loan made from the capital facilities fund. The information provided, in the case of an interfund transfer, shall identify the public improvements on which the transferred moneys are, or will be, expended. The information, in the case of an interfund loan, shall include the date on which the loan will be repaid, and the rate of interest that the fund will receive on the loan.

"(e) The information required pursuant to subdivision (d) may be included in the local agency's annual financial report.

"(f) The provisions of subdivisions (c) and (d) shall not apply to any of the following:

"(1) Moneys received to construct public facilities pursuant to a contract between a local agency and a person or entity, including, but not limited to, a reimbursement agreement pursuant to Section 66003.

"(2) Charges that are used to pay existing debt service or which are subject to a contract with a trustee for bondholders that requires a different accounting of the charges, or charges that are used to reimburse the local agency or to reimburse a person or entity who advanced funds under a reimbursement agreement or contract for facilities in existence at the time the charges are collected.

"(3) Charges collected on or before December 31, 1998.

"(g) Any judicial action or proceeding to attack, review, set aside, void, or annul the ordinance, resolution, or motion imposing a fee or capacity charge subject to this section shall be brought pursuant to Section 66022.

"(h) Fees and charges subject to this section are not subject to the provisions of Chapter 5 (commencing with Section 66000), but are subject to the provisions of Sections 66016, 66022, and 66023.

"(i) The provisions of subdivisions (c) and (d) shall only apply to capacity charges levied pursuant to this section."

***128 *421 **524 Plaintiffs rely on this court's decision in ***129 *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 228 Cal.Rptr. 47, 720 P.2d 935 (*San Marcos*). The issue there was whether a provision of the state Constitution exempting public entities from payment of property taxes (Cal. Const., art. XIII, § 3 , subd. (b)) applied to a local water district's capacity fee, used to fund capital improvements to the water system. The constitutional property tax exemption for public entities had been construed to include *422 special assessments, but not user fees, and thus the issue presented to this court was whether the capacity charge was more properly characterized as a special assessment or as a user fee for purposes of this constitutional provision. We concluded that a capacity charge was a hybrid, in the sense that it had some characteristics of a user fee and some characteristics of an assessment. (*San Marcos, supra,* at p. 163, 228 Cal.Rptr. 47, 720 P.2d 935.) We concluded also, however, that the fee should be considered an assessment for purposes of the public entity property tax exemption. We established a bright-line rule that "a fee aimed at assisting a utility district to defray costs of capital **525 improvements will be deemed a special assessment from which other public entities are exempt." (*Id.* at pp. 164-165, 228 Cal.Rptr. 47, 720 P.2d 935.) [FN4]

> FN4. In response to our *San Marcos* decision, the Legislature granted local water districts authority to impose capacity charges on other public entities, thereby removing the public entity exemption. (See Gov.Code, §§ 54999-54999.6; *Utility Cost Management v. Indian Wells Valley Water Dist.* (2001) 26 Cal.4th 1185, 1189, 114 Cal.Rptr.2d 459, 36 P.3d 2; *City of Marina v. Board of Trustees* (2003) 109 Cal.App.4th 1179, 1182-1183, 135 Cal.Rptr.2d 815; *Utility Cost Management v. East Bay Mun. Utility Dist.* (2000) 79 Cal.App.4th 1242, 1246-1247, 94 Cal.Rptr.2d 777.)

San Marcos, supra, 42 Cal.3d 154, 228 Cal.Rptr. 47, 720 P.2d 935, is not on point here. We were not there construing the term "assessment" as used in article XIII D; instead, we were construing the constitutional provision exempting public entities from property taxes (Cal. Const., art. XIII, § 3, subd. (b)), a provision in which the term "assessment" does not appear. In deciding what constituted an assessment in *San Marcos,* we sought to determine and effectuate the constitutional purpose for exempting public entities from property taxes, a purpose that plays no role in interpreting the provisions of article XIII D that are at issue here. The characteristic that we found determinative for identifying assessments in *San Marcos*--that the proceeds of the fee were used for capital improvements--forms no part of article XIII D's definition of assessments. For each of these reasons, we agree with the Court of Appeal that *San Marcos* is not helpful, much less controlling, in this strikingly different context. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2, 39 Cal.Rptr. 377, 393 P.2d 689 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."]; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1008, 239 Cal.Rptr. 656, 741 P.2d 154 [a word may have different legal meanings in different contexts]; *In re Marriage of Buol* (1985) 39 Cal.3d 751, 757, fn. 6, 218 Cal.Rptr. 31, 705 P.2d 354 [same].)

[6] Plaintiffs invoke the rule that when a term has been given a particular meaning by a judicial decision, it should be presumed to have the same meaning in later-enacted statutes or constitutional provisions. (See *People v. Hurtado* (2002) 28 Cal.4th 1179, 1188-1189, 124 Cal.Rptr.2d 186, 52 P.3d 116; ***130*423*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19, 56 Cal.Rptr.2d 706, 923 P.2d 1.) Plaintiffs argue that *San Marcos, supra,* 42 Cal.3d 154, 228 Cal.Rptr. 47, 720 P.2d 935, gave the term "assessment" a precise legal meaning as applying to capacity charges used to fund capital improvements, and therefore the term "assessment" in article XIII D, enacted after *San Marcos,* must be construed to have the same meaning. But the rule that plaintiffs invoke does not apply when, as here, the statute or constitutional provision contains its own definition

of the term at issue: "If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts." (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063, 103 Cal.Rptr.2d 751, 16 P.3d 166.) Here, article XIII D provides both an express definition of assessment and an implied qualification of that definition through the requirement that the agency identify the specific parcels on which the assessment will be imposed.

Plaintiffs next rely on the definition of assessment in Government Code section 53750, part of the Proposition 218 Omnibus Implementation Act (Gov.Code, §§ 53750-53753) that the Legislature enacted in 1997. (Stats.1997, ch. 38, § 5.) Government Code section 53750 states that "[f]or purposes of Article XIII C and Article XIII D of the California Constitution" an "assessment" means "any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided." (Gov.Code, § 53750, subd. (b).) As plaintiffs point out, this definition does not distinguish between charges imposed only in response to a request for service and charges imposed on previously identified parcels. In this respect, **526 the statutory definition is no different from the constitutional definition in section 2, subdivision (b), of article XIII D. But the statutory provisions implementing article XIII D, like article XIII D itself, assume that assessments are imposed only on identified parcels. Under Government Code section 53753, subdivision (b), before levying a new or increased assessment, an agency must give notice " to the record owner of each identified parcel." Government Code section 53750, subdivision (g), defines an "identified parcel" as "a parcel of real property that an agency has identified as having a special benefit conferred upon it and upon which a proposed assessment is to be imposed...." Because the statutory provisions merely reflect the constitutional provisions, they do not alter our conclusion that under article XIII D an assessment is a charge imposed on previously identified parcels, and not a charge imposed only as a condition of extending service through a new service connection.

Arguing that a charge imposed only on property owners who voluntarily seek a governmental service or approval may properly be characterized as an assessment, plaintiffs call our attention to the Integrated Financing District *424 Act (Gov.Code, § 53175 et seq.), under which local agencies may establish "contingent assessments" payable only when a landowner applies for development approval. (See *id.*, § 53187.) As plaintiffs point out, the Integrated Financing District Act includes notice and majority protest provisions for owners of property subject to the contingent assessment (*id.*, § 53183). (See *Southern Pacific Pipe Lines, Inc. v. Board of Supervisors* (1992) 9 Cal.App.4th 451, 461-462, 11 Cal.Rptr.2d 745.) We agree that the District's capacity charge is similar to a contingent assessment under the Integrated Financing District Act, but this ***131 observation does not assist plaintiffs. Unlike article XIII D, the Integrated Financing District Act does not require a local agency to identify in advance the particular parcels that *will be* subject to the assessment. Instead, the notice of intention to impose a contingent assessment goes to all owners of property within the proposed assessment zone, and the assessment cannot be imposed if protested by "the owners of more than one-half of the area of the property within the proposed ... district which is proposed to be subject to the contingent assessment immediately or in the future...." (Gov.Code, § 53183, subd. (d).) Thus, under the Integrated Financing District Act, in contrast to article XIII D, all owners of property *potentially* subject to a charge are entitled to notice and a weighted vote.

Article XIII D could have been written, like the Integrated Financing District Act, to cover contingent assessments as well as assessments imposed only on previously identified parcels. But it was not written in that manner, and we remain persuaded that a capacity charge contingent on some voluntary action by the property owner is not an assessment within the meaning of article XIII D.

[7] Plaintiffs argue that the Court of Appeal erred in characterizing the District's capacity charge as a development fee. Observing that development fees "are imposed only if a property owner elects to develop" (*Loyola Marymount University v. Los Angeles Unified School Dist.* (1996) 45 Cal.App.4th 1256, 1267, 53 Cal.Rptr.2d 424), the Court of Appeal reasoned that the District's capacity charge, because it was imposed only in response to a property owner's voluntary decision to request a service connection, should be considered a development fee and thus exempt from the requirements of article XIII D under its section 1, subdivision (b), stating that "[n]othing in this article ... shall be construed to ... [a]ffect existing laws relating to the imposition of fees or charges as a condition of property development."

Plaintiffs insist that the District's capacity charge cannot be a development fee because the District has no authority to approve or disapprove property development, and because a property owner may request a new service connection without proposing any new development, such as when the owner *425 of a previously developed residential parcel decides to use the District's water instead of water from an existing well on the property.

We agree with plaintiffs that the District's capacity charge is not a development fee. It is similar to a development fee in being imposed**527 only in response to a property owner's voluntary application to a public entity, but it is different in that the application may be only for a water service connection without necessarily involving any development of the property. (See *Utility Cost Management v. Indian Wells Valley Water Dist., supra,* 26 Cal.4th at p. 1191, 114 Cal.Rptr.2d 459, 36 P.3d 2 [noting that a capacity charge "might apply regardless of whether a development project is at issue"]; *Capistrano Beach Water Dist. v. Taj Development Corp.* (1999) 72 Cal.App.4th 524, 530, 85 Cal.Rptr.2d 382 [concluding that a capacity charge is not a development fee under the Mitigation Fee Act (Gov.Code, § 66000 et seq.)].) Our agreement that the capacity charge is not a development fee does not assist plaintiffs, however, because it does not mean that the capacity charge is an assessment within the meaning of article XIII D. The capacity charge is neither an assessment nor a development fee under article XIII D.

We conclude, as did the trial court and the Court of Appeal, that the District's ***132** capacity charge is not an assessment under article XIII D.

III. THE FIRE SUPPRESSION CHARGE

Article XIII D provides: "No fee or charge may be imposed for general governmental services including, but not limited to, police, *fire,* ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners." (Art. XIII D, § 6, subd. (b)(5), italics added.) At the trial below, the evidence showed that the District uses the proceeds of the fire suppression component of the connection fee to purchase equipment for its volunteer fire department, including both firefighting equipment and emergency medical equipment. [FN5] The fire department provides firefighting and emergency medical services to the public at large. Accordingly, the District's fire suppression charge is "imposed for general governmental services" within the meaning of section 6, subdivision (b)(5), of article XIII D, and it is prohibited by that provision if it satisfies article XIII D's definition of a "fee or charge."

> FN5. Government Code section 50078 authorizes "[a]ny local agency which provides fire suppression services" to "determine and levy an assessment for fire suppression services." Plaintiffs have argued that the District may not rely on this provision as authority for its fire suppression fee because Government Code section 50001 defines "local agency" to include only cities and counties. Plaintiffs have overlooked Government Code section 50078.1, subdivision (b), which defines "local agency," as used in Government Code section 50078, to include any city, county, "or special district."

*426 Article XIII D defines a "fee" or "charge" as "any levy other than an ad valorem tax, a special

tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property-related service." (*Id.*, § 2, subd. (e).) It defines "property-related service" as "a public service having a direct relationship to property ownership." (*Id.*, § 2, subd. (h).)

[8] The District argues that the connection fee, including its fire suppression component, does not fall within article XIII D's definition of a fee or charge because it is not imposed "upon a parcel or upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) The District does not impose the fee on parcels of real property but on persons who apply for a water service connection. The District does not impose the fee on such persons "as an incident of property ownership" but instead as an incident of their voluntary decisions to request water service. If a person fails to pay the connection fee, the District does not collect it by levying upon the person's property. Rather, because the person applying for service has not satisfied a condition for extending service, the District does not make the water connection and does not provide water service.

We agree that a connection charge, because it is not imposed "as an incident of property ownership" (art. XIII D, § 2, subd. (e)), is not a fee or charge under article XIII D. A connection fee is not imposed simply by virtue of property ownership, but instead it is imposed as an incident of the voluntary act of ****528** the property owner in applying for a service connection.

Urging a different construction, plaintiffs rely on article XIII D's definition of a fee or charge as "including a user fee or charge for a property-related service." (*Id.*, § 2, subd. (e).) They argue that supplying water is a "property-related service," and, therefore, all charges for water service must be deemed to be imposed *****133** "upon a person as an incident of property ownership."

We agree that supplying water is a "property-related service" within the meaning of article XIII D's definition of a fee or charge. In the ballot pamphlet for the election at which article XIII D was adopted, the Legislative Analyst stated that "[f]ees for water, sewer, and refuse collection service probably meet the measure's definition of property-related fee." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Prop. 218 by Legis. Analyst, p. 73.) The Legislative Analyst apparently concluded that water service has a direct relationship to property ownership, and thus is a property-related service within the meaning of article XIII D because water is indispensable to most uses of real property; because water is provided through pipes that are physically connected to the property; and because a water provider may, by recording a certificate, obtain a lien on the property for the amount of any ***427** delinquent service charges (see Gov.Code, §§ 61621 , 61621.3). But the Legislative Analyst was apparently referring to fees imposed on existing water service customers, not fees imposed as a condition of initiating water service in the first instance.

Several provisions of article XIII D tend to confirm the Legislative Analyst's conclusion that charges for utility services such as electricity and water should be understood as charges imposed "as an incident of property ownership." For example, subdivision (b) of section 3 provides that "fees for the provision of electrical or gas service shall not be deemed charges or fees imposed as an incident of property ownership" under article XIII D. Under the rule of construction that the expression of some things in a statute implies the exclusion of other things not expressed (*In re Bryce C.* (1995) 12 Cal.4th 226, 231, 48 Cal.Rptr.2d 120, 906 P.2d 1275), the expression that electrical and gas service charges are not within the category of property-related fees implies that similar charges for other utility services, such as water and sewer, are property-related fees subject to the restrictions of article XIII D.

This implication is reinforced by subdivision (c) of article XIII D, section 6, which expressly excludes "fees or charges for sewer, water, and refuse collection services" from the voter approval

requirements that article XIII D imposes on property-related fees and charges. Because article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee and charges, the implication is strong that fees for water, sewer, and refuse collection services are subject to those other requirements. (See *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 645, 119 Cal.Rptr.2d 91 [reaching the same conclusion].)

Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that *all* water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.

***134 Any doubt on this point is removed by considering the requirements that article XIII D imposes on property-related fees and charges. As with assessments, article XIII D requires local government agencies to identify the *428 parcels affected by a property-related fee or charge. Specifically, it requires the agency to identify "[t]he parcels **529 upon which a fee or charge is proposed for imposition." (Art. XIII D, § 6, subd. (a)(1).) As we have explained, it is impossible for the District to comply with such a requirement for connection charges, because the District cannot determine in advance which property owners will apply for water service connection. As with assessments, this impossibility of compliance strongly suggests that connection fees for new users are not subject to article XIII D's restrictions on property-related fees.

Because the connection fee, including the fire suppression charge, is not a property-related fee or charge within the meaning of article XIII D, it is not subject to article XIII D's prohibition on property-related fees or charges for general governmental services.

IV. AMENDMENT OF AN ORDINANCE BY A RESOLUTION

[9] Government Code section 66016, part of the Mitigation Fee Act (Gov.Code, § 66000 et seq.), provides in subdivision (b): "Any action by a local agency to levy a new fee or service charge or to approve an increase in an existing fee or service charge shall be taken only by ordinance *or resolution.*" (Italics added.) We agree with the Court of Appeal that this provision authorizes the District to use a resolution to increase existing connection fees, and that this authorization applies even when the fees were initially imposed by an ordinance.

Arguing to the contrary, plaintiffs assert that the Mitigation Fee Act is procedural rather than substantive. In other words, it does not give local water districts substantive authority to impose fees, but instead it merely regulates the manner in which fees may be imposed. But whether a fee imposed by ordinance may be amended by resolution is essentially a question of procedure, not substance. Therefore, we may and do construe Government Code section 66016 as giving the District authority to use a resolution to amend a fee ordinance.

In support of their position that the District may not use a resolution to amend an ordinance imposing a connection fee, plaintiffs rely on *Cavalier Acres, Inc. v. San Simeon Acres Community Services District* (1984) 151 Cal.App.3d 798, 199 Cal.Rptr. 4 (*Cavalier Acres*), in which the Court of Appeal concluded that a community services district could impose or increase water charges only by ordinance. In reaching this conclusion, the *Cavalier Acres* Court of Appeal relied on Government Code section 61621.5 and Health and Safety Code section 5471. Relying on the rule of construction that when

two statutory provisions conflict, the one that is more specific controls, *429 the *Cavalier Acres* Court of Appeal stated that, as applied to water charges imposed by a community services district, Government Code section 61621.5 and Health and Safety Code section 5471 were both more specific than Government Code section 66016.

Government Code section 61621.5 is part of the Community Services District Law (Gov.Code, § 61000 et seq.). As here relevant, it provides: "Except as otherwise provided in this section, a district may *by ordinance* adopt regulations binding upon all persons to govern the construction and use of its facilities and property, including regulations imposing reasonable charges for the use thereof." (Gov.Code, § 61621.5, subd. (a), italics added.) By its ***135 terms, this provision applies only to charges for the use of a community services district's *facilities,* not charges for its *services.* The Community Services District Law gives districts authority to impose charges for services, including charges for water, in a different section, Government Code section 61621. (See *Waterman Convalescent Hospital, Inc. v. Jurupa Community Services Dist.* (1996) 53 Cal.App.4th 1550, 1552-1553, 62 Cal.Rptr.2d 264.) As relevant here, it provides: "A district may prescribe, revise and collect rates or other charges for the services and facilities furnished by it...." (Gov.Code, § 61621.) Nothing in this provision requires a community services district to act by ordinance rather than by resolution when, as here, it revises and prescribes the charges for water service.

Health and Safety Code section 5471 is part of article 4 ("Sanitation and Sewerage Systems") of chapter 6 ("General Provisions with Respect to Sewers") of part 3 ("Community Facilities") of division 5 ("Sanitation") of **530 the Health and Safety Code. As relevant here, it reads: "In addition to the powers granted in the principal act, *any entity* shall have power, *by an ordinance* approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges, including *water,* sewer standby or immediate availability charges, for services and facilities furnished by it, either within or without its territorial limits, in connection with its *water,* sanitation, storm drainage, or sewerage system...." (Italics added.)

Health and Safety Code section 5471 does not apply to the District because it is not an "entity" within the meaning of this provision. Health and Safety Code section 5470 states that " '[e]ntity' means and includes counties, cities and counties, cities, sanitary districts, county sanitation districts, sewer maintenance districts, and other public corporations and districts authorized to acquire, construct, maintain and operate sanitary sewers and sewerage systems." The District is a public agency organized as a community services district under the Community Services District Law (Gov.Code, § 61000 et seq.) to provide water service. Nothing in the record indicates it is authorized *430 to construct, maintain, or operate sewers or sewerage systems. In this respect, *Cavalier Acres, supra,* 151 Cal.App.3d 798, 199 Cal.Rptr. 4, is distinguishable because the community services district at issue there provided both water and sewer services. (See *id.* at p. 800, 199 Cal.Rptr. 4.)

Moreover, even if we assume that Health and Safety Code section 5471 applies to the District, that provision, by its terms, confers authority "[i]n addition to" the authority otherwise granted to a public entity. In other words, its main purpose is to supplement rather than to limit a public agency's authority to impose charges for water or sewer services in connection with a water or sewerage system. For a public agency organized as a community services district, the "principal act" (*ibid.*) providing its authority is the Community Services District Law (Gov.Code, § 61000 et seq.). As we have seen, Government Code section 61621 authorizes community services districts to establish charges for water services without requiring that they act by ordinance rather than by resolution, and Government Code section 66016, part of the Mitigation Fee Act (Gov.Code, § 66000 et seq.), expressly authorizes districts to use either a resolution or an ordinance to impose or increase a service charge. We do not read Health and Safety Code section 5471 as limiting or abrogating that authority.

Again, we find *Cavalier Acres, supra,* 151 Cal.App.3d 798, 199 Cal.Rptr. 4, to be ***136** distinguishable. In 1984, when the Court of Appeal decided *Cavalier Acres,* the wording of Health and Safety Code section 5471 was materially different. The introductory phrase ("In addition to the powers granted in the principal act") was not present, having been added later by amendment. (Stats.1988, ch. 706, § 1, p. 2348.) The 1988 amendment demonstrates the Legislature's intent that Health and Safety Code section 5471 not be read as limiting the powers conferred on public entities by the laws under which they were organized.

V. CONCLUSION

Before beginning to provide water service to real property through a new connection, the District requires its new customers to pay a capacity fee and a fire suppression fee. Both of these fees are used to fund capital improvements, the former to the water system and the latter to the volunteer fire department. Because these fees are imposed only on the self-selected group of water service applicants, and not on real property that the District has identified or is able to identify, and because neither fee can ever become a charge on the property itself, we conclude that neither fee is subject to the restrictions that article XIII D imposes on property assessments and property-related fees. We also conclude that the District could properly use a resolution to amend an ordinance establishing these fees.

*431 The judgment of the Court of Appeal is reversed and the matter is remanded to that court with directions to affirm the trial court's judgment.

**531 WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, BROWN and MORENO, JJ.

32 Cal.4th 409, 83 P.3d 518, 9 Cal.Rptr.3d 121, 2004 Daily Journal D.A.R. 1146, 2004 Daily Journal D.A.R. 1429

Briefs and Other Related Documents (Back to top)

- 2002 WL 31940371 (Appellate Brief) PETITIONER'S REPLY BRIEF ON THE MERITS (Sep. 10, 2002)
- 2002 WL 1926311 (Appellate Brief) RESPONDENT'S ANSWER BRIEF ON THE MERITS (Jul. 29, 2002)
- 2002 WL 32355409 (Appellate Petition, Motion and Filing) Petition for Review (Mar. 14, 2002)Original Image of this Document with Appendix (PDF)
- S105078 (Docket) (Mar. 14, 2002)

END OF DOCUMENT

EXHIBIT 6

Email message text
Object type: [GW.MESSAGE.MAIL]
Item Source: [Received]
Message ID: [4235A7FE.Demo-dom.Demo-PO.100.167676C.1.1658.1]
From: [Kelly Salt]
To: []
Subject: [Fwd: FW: KELCO Proposed Arrangement]
Creation date: [3/2/2005 12:15:52 PM]
In Folder: [Kelco&ISP]
Attachment File name: [F:\Output\TZeleny1\1665.1-GW.MESSAGE.MAIL]
Message: [
Tom, attached is the e-mail.

]

Email message text
Object type: [GW.MESSAGE.MAIL]
Item Source: [Received]
Message ID: [4225A068.Demo-dom.Demo-PO.200.2000002.1.326E6.1]
From: [Kelly Salt]
To: []
Subject: [Fwd: FW: KELCO Proposed Arrangement]
Creation date: [2/7/2005 11:22:52 AM]
In Folder: [Kelco&ISP]
Attachment File name: [F:\Output\TZeleny1\1665.1.1-GW.MESSAGE.MAIL.Internet]
Message: [
Paul, attached is your e-mail to me re the proposal.

]

Zeleny

Please COPY!

[redacted]

From: "Webber, Paul" <PWEBBER@Orrick.com>
To: "'KSalt@Sandiego.gov'" <KSalt@Sandiego.gov>
Date: 10/12 1:51 PM Tuesday, October 12, 2004 1:51 PM
Subject: FW: KELCO Proposed Arrangement

>
>
> Kelly:
>
> This e-mail confirms our earlier telephone conversations. I
> understand that KELCO, a user of the Wastewater System of the City of San
> Diego, would like to defer a portion of its current service charges to the
> Wastewater System for the next four years, and make those payments in
> periodic installments payable over 25 years with an agreed-upon interest
> charge. I also gather that the installment payments would not start until
> the end of the initial four-year period, but it is unclear to me whether
> the installment payments will be payable for 25 years after the initial
> four-year period or for 21 years after the initial four-year period. I
> understand that, to accomplish this, the City would enter into an
> arrangement or agreement with KELCO pursuant to which KELCO would (1)
> agree to repay the deferred portion of service charges over the next 21/25
> years, and (2) agree to pay an interest charge that would probably be tied
> to either the City pool or a LIBOR index. Further, I understand that the
> rate structure of the Wastewater System will not be revised or amended in
> connection with this proposed arrangement.
>
> You asked us to review the Master Installment Purchase Agreement
> (the "MIPA") related to the Wastewater System to determine if this
> proposed arrangement would breach any of the provisions of the MIPA. We
> note the following conflicts, or potential conflicts.
>
> * Section 6.08. Rate Covenant. Section 6.08(a) of the MIPA provides
> that the City must "fix, prescribe and collect rates and charges for the
> Wastewater System which will be at least sufficient" to pay debt service
> on the Obligations (other than Parity Obligations), and to yield during
> each fiscal year Net System Revenues equal to 120% of the debt service of
> the Parity Obligations for the fiscal year. If the shortfall from the
> KELCO deferrals is not being funded by rates and charges charged to the
> other users of the Wastewater System, then this raises a couple of
> questions with respect to the rate covenant. If the payments KELCO would
> make pursuant to this arrangement are payable in installments over 25
> years and if the first installments are deferred for four years (if that
> is the case), then those payments would presumably not be included into
> System Revenues within the meaning of the MIPA. Subject to checking with
> your auditor and outside auditors, I do not believe that, even if System
> Revenues were calculated on an accrual basis, payments that are payable to
> the Wastewater System in future fiscal years may be included into System
> Revenues unless they are payable within one year from the date of
> calculation. Accordingly, most the future payments that KELCO would make
> pursuant to this arrangement would presumably not be included into System
> Revenues, which would then reduce the amount of System Revenues available
> for the rate covenant calculation. This can, of course, be remedied by
> taking funds out of the Rate Stabilization Fund and including them into
> System Revenues if that is what the City chooses to do. I have not looked

HLW

> at projections since last summer, but my recollection is that the City
> already needed to make use of the Rate Stabilization Fund to maintain the
> 1.20x coverage when it was already collecting, indirectly, for the KELCO
> deferrals under the "old" system. If the City is not collecting the KELCO
> deferrals and is not imposing higher rates, then how would the KELCO
> arrangement impact the rate covenant projections? This is particularly an
> important question in light of the increase in pension payments that the
> Wastewater System will be making as a consequence of the Gleason
> settlement.
> Alternatively, if the City were to raise rates to compensate
> for the loss of System Revenues resulting from the KELCO arrangement, then
> the City would confront the same problems that it had before the
> modification of the rate structure went into effect. That is, the
> increase in rates would (1) create a problem under the City's arrangements
> with the SWRCB (which is discussed below), (2) possibly violate
> Proposition 218 (which is discussed below) and (3) possibly impose a tax
> rather then a fee on other users who would in essence be subsidizing
> KELCO's use of the Wastewater System.
>
> * Section 6.10. Compliance with Contracts. The City must comply with
> the provisions of all contracts that affect or involve the Wastewater
> System to the extent that the City is a party to those contracts. The
> City is a party to the State Water Resources Control Board ("SWRCB")
> loans, which require the Wastewater System's service rates and charges be
> proportional among all users of the system. Absent a consent from the
> SWRCB, the proposed arrangement with KELCO would probably breach the terms
> of the SWRCB loans, thereby breaching the terms of Section 6.10 of the
> MIPA.
>
> * Section 6.14. Compliance with Governmental Regulations. The City
> must "duly observe and conform with all valid regulations and requirements
> of any governmental authority relative to the operation of the Wastewater
> System or any part thereof...." The City's service rates and charges may
> be subject to Proposition 218. If the City's service rates and charges
> are subject to Proposition 218, then Section 6(b)(3) of Propositional 218
> requires that any property-related fees and charges shall not "exceed the
> proportional cost of providing the service attributable to the parcel."
> Even if there is no rate adjustment, the accommodation made to KELCO could
> be viewed as an overcharge to other customers such as may have been
> happening before the modification to the rate structure, when the rate
> charged to KELCO did not reflect the proportional burden that KELCO
> imposed on the Wastewater System, thereby shifting those costs to other
> users of the Wastewater System. Further, the argument could be made that
> the rates charged to the other users of the Wastewater System really have
> a tax component because they are not reasonably related to the services
> rendered. Thus, the arrangement with KELCO may violate this standard,
> which, if violated, could, in turn, constitute a breach under Section 6.14
> of the MIPA.
>
> Any other regulations or applicable law that the
> proposed arrangement with KELCO would violate would also constitute a
> breach under the MIPA as well. For example, the City received Clean Water
> Act grants from the United States that the City used in constructing
> components of the Wastewater System. If any applicable regulations
> prohibit an arrangement such as the proposed arrangement with KELCO,
> irrespective of the fines or penalties that would be assessed, a violation

> of such regulations would also constitute a breach under the MIPA.
>
> * Section 6.15. Collection of Rates and Charges; No Free Service.
> This section of the MIPA may be implicated in two respects. First, I
> understand that none of the current rules and regulations relating to the
> administration of rates and charges permit the deferral of payments for
> anything like 25 years or more. Therefore, if there were just an agreement
> with KELCO away from the rules and regulations, this may violate the first
> part of Section 6.15 which provides that the City must have in effect at
> all times rules and regulations for the payment of bills for the services
> of the Wastewater System. Second, Section 6.15 provides that the City may
> not "permit any part of the Wastewater System or any facility thereof to
> be used or taken advantage of free of charge." The arrangement with KELCO
> would also arguably violate this Section by permitting a payment deferral,
> even though interest is charged, since it is really something that other
> rate payers do not have available to them.
>
> * Section 6.19. Operation of Wastewater System. This section
> requires that the City "operate the Wastewater System in an efficient and
> economical manner...." This proposed arrangement may violate this section
> if the City undertakes legal risk, such as a potential violation under
> Proposition 218 or breach of another obligation, in connection with the
> proposed arrangement. In addition, if the City agrees to the arrangement
> with KELCO on commercially unfavorable terms, such as is discussed below,
> then this covenant may also be breached. The terms "efficient and
> economical" are inherently subject to a wide spectrum of interpretations
> and are the type of terms that are fertile farming grounds for plaintiff
> attorneys seeking to bring an action against the City.
>
> You mentioned that KELCO would be paying the "pool rate" or perhaps
> some "LIBOR" rate for this arrangement. We note that as of December 31,
> 2003, the quality of the pool bordered on the high end of "AA" and that
> the weighted average maturity of the pool was 1.24 years and the weighed
> average yield was 1.89%. You indicated that you did not know whether
> KELCO had a rating but I would be surprised if it has a rating equal to
> the quality of the investments in the pool. Accordingly, the nature of
> the credit would seem to warrant a substantially higher interest rate than
> the pool rate or a short-term interest rate. You mentioned that there
> would be some type of credit backing of KELCO's obligations, but,
> realistically speaking, I do not think that a lending institution would
> provide credit support spanning 25 years. Moreover, if you were to treat
> this as being equivalent to a pool investment it would not be a
> permissible investments under the provisions of Section 53601 of the
> Government Code.
>
> Please let me know if you have any questions.

"MMS <Orrick.com>" made the following annotations.

EXHIBIT 7

Email message text
Object type: [GW.MESSAGE.MAIL.Attorney]
Item Source: [Received]
Message ID: [42D3CA3D.MWWD.MW_DEPT.100.16C6171.1.354F2.1]
From: [Thomas Zeleny]
To: [;Scott Tulloch;STulloch@sandiego.gov;Anita Noone;ANoone@sandiego.gov;Thomas Zeleny;TZeleny@sandiego.gov]
Subject: [Confidentiality Agreement]
Creation date: [7/12/2005 1:48:35 PM]
In Folder: [Mail Box]
Attachments: None
Message: [
--CONFIDENTIAL ATTY/CLIENT COMMUNICATION--

Hi Scott,
The City Attorney has told me that the confidentiality agreement we executed with Kelco and ISP last year is unenforceable because it is against public policy. He instructed me not to send the letter I drafted to Kelco and ISP informing them of the SEC subpoena.

Ironically with regard to Kelco the point is moot because the City has inadvertently complied with the notice provision. Alan told me he bumped into a representative of Kelco and gave him a copy of the subpoena at his request. Kelco now has notice.

From this point forward, MWWD should not consider itself constrained by the confidentiality agreement in responding to the SEC subpoena.

There may still be an issue as to the scope of the City Council's waiver of the atty/client privilege, particularly as to communications between our offices after the date of the City Council's waiver. We might have to keep those documents separate pending another waiver of the atty/client privilege by the City Council. I'll check into that and report back. Thanks,

--TomZ

Thomas C. Zeleny
Deputy City Attorney
San Diego City Attorney's Office
619-533-5800
tzeleny@sandiego.gov

]

EXHIBIT 8

Zeleny

From: Kelly Salt
To: Charles Yackly; Frank Belock; John Kirk; Lori Girard; Mark Blake; Richard Mendes; Scott Tulloch; Ted Bromfield; Thomas Zeleny
Date: Thu, Jun 16, 2005 2:35 PM
Subject: Fwd: [CCA] HJTA v. Fresno

I wanted to forward to you the attached communication from Michael Colantuono. He is the attorney representing the League of California Cities in the Howrd Jarvis Taxpayers Ass'n v. City of Fresno case. Based upon the denial of review by the California Supreme Court in that case, it appears that water and sewer fees are subject to the noticing provisions of Prop 218. As we receive more information on this I will forward it to you.

CC: Prescilla Dugard

EXHIBIT 9

291398
Wastewater Hot 02_27_06

Email message text
Object type: [GW.MESSAGE.MAIL]
Item Source: [Received]
Message ID: [42E7F379.MWWD.MW_DEPT.100.1743767.1.B563.1]
From: [Thomas Zeleny]
To: [;Dennis Kahlie;DKahlie@sandiego.gov;Hedy Griffiths;HGriffiths@sandiego.gov;Richard Enriquez;RJEnriquez@sandiego.gov;John Riley;JRiley@sandiego.gov;Kelly Salt;KSalt@sandiego.gov;Ted Bromfield;TBromfield@sandiego.gov]
Subject: [UCAN lawsuit chronology]
Creation date: [7/27/2005 8:49:56 PM]
In Folder: [Mail Box]
Attachment File name: [c:\MW_DEPTOut\RJEnriquez\1871.1-COD billing chronology.doc]
Message: [
Richard, Dennis, Hedy:
We plan on going to closed session to update the City Council on the UCAN case. Could you please look at the attached chronology of major events to see if I've made any mistakes. I put this together using some of Ted's notes. Please feel free to add information or major events I am missing. I anticipate being in meetings all day tomorrow, but I'll be back in the office on Friday. Thanks,
--TomZ

Thomas C. Zeleny
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]

Chronology of major events
in adoption of organics component
in City's sewer rate structure

Date	Event
(month, year)	First SRF loan (or grant) contract executed that includes an organics component as part of an approved rate structure.
(month), 1997?	City starts billing Participating Agencies with an organics component.
May, 1998	Organics component formally incorporated into the "Metro Agreement" between the City and the Participating Agencies.
September, 1999	City Council approves commencement of a Cost of Services study.
May, 2001	Draft of Cost of Services study finalized with stakeholders input.
January 22, 2002	City Attorney advises City Council in closed session regarding potential liability of not adopting an organics component in the city's sewer rate structure. (closed session memo dated 12/06/01)
November 14, 2002	City Attorney issues confidential memo to City Council indicating the City must adopt an organics component in its sewer rate structure.
November 22, 2002	City Council receives draft Cost of Services study with caution that the cost data needs updating.
October, 2003	Updated Cost of Services study submitted to City Council and PUAC for review.
November 26, 2003	State requests copy of City Ordinance adopting new sewer rate structure.
March, 2004	State requests adoption of new sewer rate structure within 90 days. (Is this the same letter that threatened accelerated repayment?)
June, 2004	Cost of Services study and new sewer rate structure adopted by City Council.
October, 2004	New sewer rate structure becomes effective.
(month, year)	Lawsuit filed by UCAN.
(month, year)	City Council advised in closed session about UCAN lawsuit.